Supreme Court, U. S.
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No. 75-1663

In the Supreme Court of the United States

OCTOBER TERM, 1976

MELVIN FRIEDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES

Petitioner was initially convicted under the obscenity standards of *Roth* v. *United States*, 354 U.S. 476, and *Memoirs* v. *Massachusetts*, 383 U.S. 413. Upon remand in light of the intervening decision in *Miller* v. *California*, 413 U.S. 15, petitioner was convicted under the obscenity standards of that case. Petitioner contends that the application of the *Miller* standards at the second trial constituted a denial of due process.

1. In 1971, after a jury trial in the United States District Court for the Western District of Oklahoma, petitioner and co-defendant Peachtree National Distributors, Inc., were convicted of transporting obscene materials in interstate commerce, in violation of 18 U.S.C. 1465. Petitioner was sentenced to 30 months' imprisonment and a $5,000 fine. The court of appeals vacated and remanded for a new trial in light of the intervening decision

in *Miller* v. *United States*, 413 U.S. 15 (App., *infra*, pp. 6-8; 488 F. 2d 1141). After a second jury trial, held under the *Miller* standards, petitioner was again convicted of transporting obscene materials.[1] He received the same sentence and was required to pay one-half of the trial costs. The court of appeals affirmed (Pet. App. A1-A8; 528 F. 2d 784), and denied rehearing (Pet. App. A9-A10).

At the first trial, the evidence showed that in 1970 petitioner was president of Peachtree National Distributors, Inc., in Atlanta, Georgia (I Tr. 70, 151-152).[2] In December 1970, the company distributed, among other publications, twenty-four copies of a book entitled "The Animal Lovers" to Walt's News and Book Store in Lawton, Oklahoma (I Tr. 13-27). The book, which was introduced at trial (I Tr. 18), explicitly depicts and describes acts of beastiality. An English teacher, a minister, and a psychiatrist testified that the book was written solely as an appeal to the prurient interest, that it exceeds contemporary standards regarding the depiction of sexual matters, and that it has no redeeming social or scientific value (I. Tr. 85, 104-105, 125, 140).

A psychologist, an English teacher, and an applied health sciences teacher testified on petitioner's behalf. They were of the opinion that "The Animal Lovers" does not appeal to the prurient interest, that it does not exceed contemporary community standards regarding descriptions of sexual matters, that it has educational value, and

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[1]Co-defendant Peachtree pleaded guilty prior to the second trial.

[2]"I Tr." refers to the one volume transcript of petitioner's 1971 trial "II Tr." refers to the two-volume transcript of petitioner's 1974 trial.

that it has a pretense of literary merit (I Tr. 182, 190-191, 197, 268-269, 289-290, 322).

The jury was instructed under the *Roth-Memoirs* obscenity standards. Specifically, the jury was told that the book could be found obscene only if the jury found that it appealed to the prurient interest of the average person of the national community, that it was patently offensive under national community standards, and that it was utterly without redeeming social value (I Tr. 403-408).

While petitioner's appeal was pending, this Court announced new constitutional standards for determining obscenity in *Miller* v. *California*, 413 U.S. 15, and related cases.[3] Noting that it was unable to assume that national standards are more lenient than local standards, the court of appeals vacated and remanded for a new trial (App., *infra*).

The government's evidence at the second trial was substantially the same as that submitted at the first trial (II Tr. 16-19, 88-89), although no expert witness testified. The book was introduced at trial (II Tr. 18-19).[4]

A psychologist testified on petitioner's behalf that the book did not appeal to the prurient interest (II Tr. 104). The trial judge rejected petitioners' proffer of testimony by an English teacher that the book is not utterly without social value (II Tr. 117-118).

The jury was instructed under the *Miller* standards that in order to find the book obscene, it must find that it appeals to the prurient interest, is patently offensive

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[3]*Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49; *Kaplan* v. *California*, 413 U.S. 115; *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123; *United States* v. *Orito*, 413 U.S. 139.

[4]The jury was instructed to read the entire book at both trials (I Tr. 256; II Tr. 90-91).

under contemporary community standards, and is without serious literary, artistic, political, or scientific value (II Tr. 157-164).

2. Petitioner contends that the retroactive application of the *Miller* standards to his pre-*Miller* conduct is a denial of due process. We have conceded in our brief in *Marks* v. *United States*, No. 75-708, certiorari granted, March 1, 1976, that *Miller* cannot apply retroactively to a defendant's detriment. In that brief, we reasoned that *Miller* expanded the area of potential liability, and that its retroactive application would expose defendants to criminal liability for conduct that could not have been punished when it occurred, thus depriving them of the fair notice required by the Due Process Clause (Br. 15-32). This case arises in a somewhat different posture than *Marks*. Nevertheless, we submit that it should be governed by the outcome in *Marks*.

After petitioner's first trial the court of appeals should have reviewed the conviction under both *Roth-Memoirs* and *Miller* to determine whether any aspect of the constitutional standard for obscenity as reformulated in *Miller* would have benefited petitioner by materially affecting the deliberations of the jury. *Hamling* v. *United States*, 418 U.S. 87, 102, 108. But the court below, which rendered its initial decision prior to *Hamling*, merely vacated the conviction and remanded for a new trial under *Miller* (App., *infra*; see Pet. App. A2). The vacation of the first conviction and remand for a new trial rendered the first conviction void. *Miller* v. *United States*, 173 F. 2d 922 (C.A. 6); cf. *United States* v. *Ayres*, 9 Wall. 608, 610.

Petitioner's only outstanding conviction for pre-*Miller* conduct, therefore, is based solely upon the *Miller* standards. Accordingly, this case should be held pending the decision in *Marks* and disposed of in accordance therewith.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 72-1143-44 — NOVEMBER 1973 TERM

FILED DECEMBER 11, 1973

HOWARD K. PHILLIPS CLERK,
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, APPELLEE,

v.

MELVIN FRIEDMAN and PEACHTREE NATIONAL DISTRIBUTORS, INC., APPELLANTS.

Appeal From the United States District for the Western District of Oklahoma (D. C. No. CR-71-223)

Before LEWIS, Chief Judge, SETH and McWILLIAMS, Circuit Judges.

PER CURIAM.

Melvin Friedman and Peachtree National Distributors, Inc. appeal from their convictions and sentences for violation of 18 U.S.C. § 1465(2) after a trial to a jury in the United States District Court for the Western District of Oklahoma.

It is our view that the several recent decisions of the Supreme Court require a reconsideration of the standards applicable to cases of this nature. See *Miller* v. *California*, __U.S.__(1973), 41 U.S.L.W. 4925 (June 21, 1973); *United States* v. *Orito*,___U.S.___(1973), 41 U.S.L.W. 4956 (June 21, 1973); *United States* v. *12 200-Ft. Reels of Super 8mm. Film*,____U.S.____(1973), 41 U.S.L.W. 4961 (June 21, 1973).

These decisions, in our opinion, require a reexamination of the facts of this case together with the determination of what may be the applicable standards. We are not unmindful of the decisions of other circuits which hold that remand is not necessary. We are not prepared to hold or assume that in all instances the national standards are more lenient than all local standards. Further there are substantial unresolved questions as to the nature of the proof now required.

The decisions cited above include cases arising under state law and under federal law. The Court did not express itself directly on the application of "community standards" to trials under the federal statute as compared to its statement as to the state laws in *Miller*. See, however, *United States* v. *12 200-Ft. Reels*, Slip Opinion at 7, and the reference therein to "these" standards. *12 200-Ft. Reels* upheld an attack on the constitutionality of 19 U.S.C. § 1350(a), and the Court related the tests under that section to the examples in *Miller*. In *United States* v. *One Reel of Film*, 481 F. 2d 206, the First Circuit considered a post-Miller forfeiture case also under 19 U.S.C. § 1305 as to a film seized upon entry into the country.

The court there applied national standards to the seizure apparently for the very practical reasons expressed in the concurring opinion.

A consideration of the application of national or local standards should be initially made by the trial court in addition to the determination of what such standards may be. *See also* United States v. Ewing,__F. 2d__ (Tenth Circuit, No. 638-70), opinion after remand to this court.

Although it is clear that venue in this case was properly laid in the Western District of Oklahoma, 18 U.S.C. §§ 1465, 3237(a); *see* Swisher v. Moseley, 442 F. 2d 1331 (10th Cir.); United States v. Luros, 243 F. Supp. 160 (N.D. Iowa), *rev'd on substantive grounds, sub nom.* Luros v. United States, 389 F. 2d 200 (8th Cir.); *cf.* Gold v. United States, 378 F. 2d 588 (9th Cir.); United States v. Ross, 205 F. 2d 619 (10th Cir.), we query why the case was brought in that district as opposed to another. Considerations of *forum non conveniens* and the interests of justice, *see* Fed. R. Crim. P. 21 (b), and the principles enunciated in United States v. Luros, 243 F. Supp. 160 (N.D. Iowa), would appear to be applicable to such cases as this where a national distributor of "literature" distributes its material throughout the nation. *See* Jones v. Gasch, 404 F. 2d 1231 (D.C. Cir.) (opinion and dissent). We of course express no view on this matter but merely raise the question. It is apparent that this problem will be of increasing importance in cases of this nature in the future.

Accordingly, the judgments of conviction are hereby vacated and the cause is remanded to the district court for a new trial.